United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1165

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

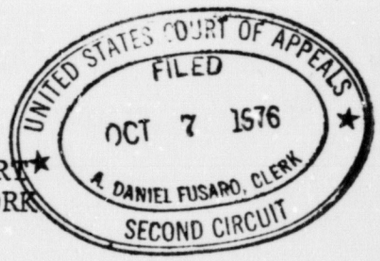
THEODORE N. CAMERIERO and
JOHN FRANK GALANTE,

Defendants-Appellants.

B
P/S

Docket No. 76-1165

REPLY BRIEF FOR APPELLANT
THEODORE N. CAMERIERO



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE N. CAMERIERO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appe~~llee~~, -against- THEODORE N. CAMERIERO and JOHN FRANK GALANTE, Defendants-Appellants.	Docket No. 76-1165

REPLY BRIEF FOR APPELLANT
THEODORE N. CAMERIERO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Having conceded the invalidity of the search warrant, the Government urges that appellant Cameriero had no standing to challenge the search and seizure of the lenses because he was not present at the time of the search and seizure and had no interest in the store or the goods involved at the time of the Government's unconstitutional conduct. The Government argues in support of its position that the automatic standing rule of

Jones v. United States, 362 U.S. 257 (1960), giving standing to a defendant charged with a possessory crime, should be overruled. Both as a factual and legal matter, the Government's position is incorrect.

In Brown v. United States, 411 U.S. 223, 228-229 (1973), the Supreme Court left undetermined whether the automatic standing rule was unnecessary. This Court has adhered to the rule: United States v. DeMarco, 488 F.2d 828, 829 (2d Cir. 1973); United States v. Mapp, 476 F.2d 67, 72-73 (2d Cir. 1973); United States v. Pastore, 456 F.2d 99 (2d Cir. 1972); United States v. Price, 447 F.2d 28, 29 (2d Cir. 1971). The Government relies on United States v. Pui Kan Lam, 483 F.2d 1202, 1205 n.4 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974). However, Pui Kan Lam was decided before DeMarco, supra, and expressly did not rule "on what was left of Jones after Brown." Thus, the standing to challenge the search and seizure here is properly based on the charge of the possessory crime.

The Government's argument that there was no possessory interest in the premises and that appellant was not present at the time of the search and seizure is factually refuted by the record. When Galante went to Cohen's store prior to the delivery of the boxes, it was agreed that Cohen would get paid for storing the boxes in the basement (Tr. at 68). The record also shows that although Cohen wanted the boxes removed from the premises after he learned they were stolen, he did nothing

to remove them. On the contrary, he was in continuous contact with Galante about arrangements for removal of the goods, and while the lenses were still in the basement he attempted to sell them. Thus, under the Government's own theory of the case -- that Galante and Cameriero were involved in a deal to possess and did possess stolen goods -- as part of that scheme they became tenants of the store for use of the basement. See Mancusi v. DeForte, 392 U.S. 364, 369 (1968).

Furthermore, the search of the truck and the seizure of the goods took place while appellant Cameriero was loading the truck with the boxes. Appellant Cameriero was thus in actual possession of the goods which had been stored in the basement at the time of the seizure. There being no basis for concluding that the Government obtained any information about the crime from other sources, Wong Sun v. United States, 371 U.S. 471, 487 (1963), the illegality of the original search of the basement taints the subsequent search of the truck, the seizure of the lenses, and the arrest of appellant Cameriero, and renders them likewise illegal. Accordingly, since Cameriero was in possession of the goods at the time of the illegal seizure, he has standing to challenge the actions of the agents. These circumstances give standing to challenge the admissibility of the evidence as to the conspiracy count just as they do for the possession count.

Standing to challenge the conspiracy count is present also because possession was the basis on which Cameriero could

be convicted of the conspiracy. See Jones v. United States, supra; Combs v. United States, 408 U.S. 224, 227 n.4 (1972). The Government relied upon, and the trial court charged, that possession of recently stolen goods may be sufficient to find that a defendant had knowledge that the goods were stolen. Knowledge is an element of the conspiracy as well as of the substantive crime. Iannelli v. United States, 95 S.Ct. 1284, 1289-1290 (1975); Direct Sales Co. v. United States, 319 U.S. 703 (1943); United States v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975); United States v. Steward, 451 F.2d 1203 (2d Cir. 1971); United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971). Since the record shows that appellant Cameriero was not present when Galante told Cohen that the goods were stolen, it was Cameriero's possession of the goods that provided the basis for making the inference that would enable the jury to find the requisite knowledge for the conspiracy count as well as for the possessory count.

The Government's having conceded that the search and seizure of the basement was illegal, the evidence should have been suppressed.

CONCLUSION

For the foregoing reasons and the arguments presented in the main brief for appellant Cameriero, the judgment of the District Court should be reversed and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
THEODORE N. CAMERIERO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

CERTIFICATE OF SERVICE

October 6, 1976

I certify that copies of the notice of motion, affidavit, and reply brief for appellant Cameriero have been served by messenger on the U.S. Attorney for the Eastern District of New York.